Supreme Court, U.S.
FILED

No. 10-705 NOV 24 2010

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In The

# Supreme Court of the United States

OLGA BARCENAS-BARRERA,

*Petitioner,*

v.

ERIC H. HOLDER, Jr.,
United States Attorney General,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether a discretionary motion to reconsider is a prerequisite to judicial review by the circuit court.

2. Whether the Board of Immigration Appeals can conduct *de novo* review of the Immigration Judge's findings of fact and engage in its own fact-finding.

3. Whether Petitioner's conviction for making a false statement on a U.S. passport application, without evidence of intent, supports a charge of inadmissibility for making a false claim of U.S. citizenship.

## PARTIES TO THE PROCEEDING

All parties to the proceeding are named in the caption of the case as recited on the cover page. There are no nongovernmental corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

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## CITATIONS TO THE OPINIONS AND ORDERS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit denying Petitioner's petition for review is unreported. *Barcenas-Barrera v. Holder,* No. 09-60536 (5th Cir. September 1, 2010). App. A, *infra*.

The decision of the Board of Immigration Appeals overturning the decision of the Immigration Judge is reported. *Matter of Barcenas-Barrera,* 25 I & N Dec. 40 (BIA 2009). App. B, *infra*.

The decision of the Immigration Judge, granting Petitioner relief is unreported. *Matter of Barcenas-Barrera*, File A 093 086 418 (United States Immigration Court, Houston, Texas, March 29, 2007. App. C, *infra*.

## STATEMENT OF JURISDICTION

On September 1, 2010, the United States Court of Appeals for the Fifth Circuit denied Petitioner's petition for review. Jurisdiction in this Court is therefore proper by *writ of certiorari* pursuant to 28 U.S.C. §1254(1). While Petitioner's case ultimately involves an application for relief from removal, review is not barred by 8 U.S.C. §1252(a)(2)(B) because the questions presented herein are "questions of law raised upon a petition for review." 8 U.S.C. §1252(a)(2)(D).

## APPLICABLE LAW

**8 U.S.C. §252(d)(1)**, which provides: "A court may review a final order of removal only if – **(1)** the alien has exhausted all administrative remedies available to the alien as of right, and **(2)** another court has not decided the validity of the order, unless the reviewing court finds that the petition presents grounds that could not have been presented in the prior judicial proceeding or that the remedy provided by the prior proceeding was inadequate or ineffective to test the validity of the order."

**INA §240(c)(7)(A), 8 U.S.C. §1229a(c)(7)(A)**, which provides: "In general. An alien may file one motion to reopen proceedings under this section, except that this limitation shall not apply so as to prevent the filing of one motion to reopen described in subparagraph (C)(iv)."

**INA §240(c)(7)(B), 8 U.S.C. §1229a(c)(7)(B)**, which provides: "The motion to reopen shall state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material."

**18 U.S.C. §1542**, which provides: "Whoever willfully and knowingly makes any false statement in an application for passport with intent to induce or secure the issuance of a passport under the authority of the United States, either for his own use or the use of another, contrary to the laws regulating the issuance of passports or the rules prescribed pursuant to such laws; or Whoever willfully and knowingly uses

or attempts to use, or furnishes to another for use any passport the issue of which was secured in any way by reason of any false statement – Shall be fined under this title, imprisoned not more than 25 years (if the offense was committed to facilitate an act of international terrorism (as defined in Section 2331 of this title), 20 years (if the offense was committed to facilitate a drug trafficking crime (as defined in Section 929(a) of this title), 10 years (in the case of the first or second such offense, if the offense was not committed to facilitate such an act of international terrorism or a drug trafficking crime), or 15 years (in the case of any other offense), or both."

**INA §212(a)(6)(C)(i) and (ii), 8 U.S.C. §1182(a)(6)(C)(i) and (ii)**, which provides: "(i) In general Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this chapter is inadmissible. (ii) Falsely claiming citizenship (I) In general Any alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit under this chapter (including Section 1324a of this title) or any other Federal or State law is inadmissible. (II) Exception In the case of an alien making a representation described in sub-clause (I), if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien

permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of making such representation that he or she was a citizen, the alien shall not be considered to be inadmissible under any provision of this subsection based on such representation."

**INA §237(a)(1)(H), 8 U.S.C. §1227(a)(1)(H)**, which provides: "The provisions of this paragraph relating to the removal of aliens within the United States on the ground that they were inadmissible at the time of admission as aliens described in Section 212(a)(6)(C)(i), whether willful or innocent, may, in the discretion of the Attorney General, be waived for any alien (other than an alien described in paragraph (4)(D)) who – (i)(I) is the spouse, parent, son, or daughter of a citizen of the United States or of an alien lawfully admitted to the United States for permanent residence; and (II) was in possession of an immigrant visa or equivalent document and was otherwise admissible to the United States at the time of such admission except for those grounds of inadmissibility specified under paragraphs (5)(A) and (7)(A) of Section 212(a) which were a direct result of that fraud or misrepresentation. (ii) is a VAWA self-petitioner. A waiver of removal for fraud or misrepresentation granted under this subparagraph shall also operate to waive removal based on the grounds of inadmissibility directly resulting from such fraud or misrepresentation."

## STATEMENT OF THE CASE

This case involves and questions: (1) the limitations and authority of the Board of Immigration Appeals (hereinafter "BIA") when reviewing decisions on appeal; (2) whether a motion to reopen and/or reconsider is a jurisdictional requirement under exhaustion of remedies for judicial review; and (3) whether a conviction for making a false statement in a U.S. passport application, without evidence of intent, supports a charge of inadmissibility for making a false claim of U.S. citizenship.

In 2003, Petitioner, Mrs. Barcenas, pleaded guilty to a charge of making a false statement on an application for a U.S. passport. She is an illiterate woman who was tricked and misguided into filing a U.S. passport application by falsely stating on the application her place of birth to be the United States. On or about 2006 and after her U.S. citizen husband petitioned for her, she applied and became a legal permanent resident of the United States. Anon, the Government became aware of the conviction and believed it to be for a false claim to citizenship. Since the Immigration and Nationality Act (hereinafter "INA") bars anyone who has falsely claimed to be a U.S. citizen from becoming a legal permanent resident, the Government charged Petitioner as inadmissible at the time of the adjustment of status to permanent resident and sought to revoke her residency on grounds she was not entitled to it.

At the hearing on the merits of her case, the Immigration Judge (hereinafter "IJ") found Petitioner made a misrepresentation, but not a false claim to U.S. citizenship. Hence, the IJ granted her a waiver of inadmissibility for the misrepresentation retroactive to the date of her admission as a legal permanent resident. The Government appealed the IJ's decision to the BIA.

Inexplicably, on appeal the BIA ignored the IJ's findings and substituted and considered only their own. In so doing, the BIA found Petitioner's conviction for falsely representing birth in the United States on a U.S. passport application was equal to a false claim to citizenship regardless of whether Petitioner had the requisite intent. As such, the BIA overturned the IJ's decision, and ordered Petitioner deported from the country.

Petitioner sought judicial review with the Fifth Circuit Court of Appeals complaining of the BIA's *de novo* review and own fact finding. Petitioner also complained of the BIA's finding that she made a false claim to citizenship. The Fifth Circuit found no jurisdiction to consider the first question alleging Petitioner failed to exhaust remedies by not asking the BIA to reopen or reconsider its own decision. As to the issue of the false claim of citizenship, the Fifth Circuit affirmed the BIA.

Three issues warrant this Court's review. First, there is a twelve to one conflict in the Circuit Court of Appeals on whether exhaustion of administrative

remedies requires, as a matter of statutory jurisdiction, a petitioner file a motion to reopen and/or reconsider before the BIA, where the BIA's decision itself results in a new issue to be appealed. While all Circuit Courts recognize statutory exhaustion of remedies as a prerequisite to review, only the Fifth Circuit requires a motion to reopen and/or reconsider prior to review. The Ninth Circuit has expressly ruled to the contrary. The Second and Eighth Circuit Courts recognize exceptions to exhaustion of remedies rule recognizing the conflict between intra- and inter-circuits. The Fifth Circuit reached its decision relying on this Court's precedential decision in *Bowles v. Russell*, 127 S.Ct. 2360 (2007). Three other circuits have considered *Bowles* interpreting it in a restrictive way and finding that exhaustion of remedies is "jurisdictional" and admits no exceptions. If confronted with the issue, and following the restrictive interpretation of *Bowles, supra*, it is reasonable to predict these circuits will most likely follow the Fifth Circuit and find that exhaustion of remedies requires motions to reopen and/or reconsider before judicial review is available. The conflict within the courts regarding exhaustion of motions to reopen and reconsider will continue to grow and can only be resolved by this Court.

The second question was not considered by the Fifth Circuit because it found no jurisdiction as previously mentioned. This question invites review of the BIA's authority to engage in its own fact-finding and only consider its own facts on appeal.

The regulations clearly provide the BIA cannot engage in fact finding.[1] In overturning the IJ's decision, the BIA ignored the IJ's findings relating to the evidence presented of Petitioner's state of mind, the lack of intent to make a false claim, and her education and illiteracy. More importantly, the BIA ignored the IJ's finding that an unscrupulous person who took advantage of her tricked her into filing a passport application and could not possibly have the subjective intent required to make a false claim to citizenship. The BIA only considered its own facts and the ruling does not comport to this Court's precedential decisions that prohibit such fact-finding.[2]

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[1] "[O]ne under investigation with a view to [removal] is legally entitled to insist upon the observance of rules promulgated pursuant to law," *Bridges v. Wixon*, 326 U.S. 135, 153 (1945) (internal quotation marks omitted), and, as such, it is an error of law for the BIA to ignore its own regulations, *see United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954); *see also Vitarelli v. Seaton*, 359 U.S. 535, 547 (1959) (Frankfurter, J., concurring in part and dissenting in part) ("This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with that sword."); *Montilla v. I.N.S.*, 926 F.2d 162, 166-67 (2d Cir. 1991); 8 C.F.R. §1003.1(d)(1) ("The Board shall resolve the questions before it consistent with the [INA] and [agency] regulations.").

[2] *Id.*

Finally, the last question supplicates this Court to decide if intent or scienter is an element of making a false claim to U.S. citizenship. Four Circuit Courts have issued rulings contrary to this Court's precedent decision of *Kungys v. United States*, 485 U.S. 759 (1988).[3] These Circuit Courts upheld decisions finding Petitioner's inadmissible for making false claims to citizenship following convictions for making false statements on passport applications. *Id.* Nevertheless, none of these courts ruled on whether evidence of an alien's intent is necessary to make a false claim to citizenship. *Id.* In *Kungys*, this Honorable Court analyzed a similar section of the INA finding that a subjective intent to make a false claim was required. *Id.* Recognizing the intent requirement issue conflict, the Fifth Circuit affirmed the BIA's decision but charged they had no choice to do so as the BIA, the agency in charge of interpreting the statute, had not provided guidance regarding the issue of intent when making a false claim.

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[3] *Vana v. Attorney General*, 341 F. App'x 836 (3d Cir. 2009); *Jackson Omier v. Gonzales*, 246 F. App'x 1 (1st Cir. 2007); *Rodriguez v. Gonzales*, 451 F.3d 60 (2d Cir. 2006); *Sowah v. Gonzales*, 196 F. App'x 576 (9th Cir. 2006); *Omari v. Holder*, 562 F.3d 314 (5th Cir. 2009).

This Court's review of all three issues is plainly warranted.

### A. Jurisdiction of the Court of Appeals

The Court of Appeals had jurisdiction over Petitioner's petition for review pursuant to INA §242(a)(1), 8 U.S.C. §1252(a)(1), which provides for judicial review of a final order of removal.

### B. Facts

The Immigration Judge found the following facts. Petitioner, Mrs. Barcenas, is a 49-year-old female. She is a native and citizen of Mexico whose status was adjusted to that of a lawful permanent resident on September 23, 2006. App. C, *infra*. Petitioner is an illiterate woman who does not read or write Spanish and/or English. App. C, *infra*. Petitioner has been residing in the United States since on or about 1986 when she was approximately 29 to 30 years old. App. C, *infra*. She is married to a U.S. citizen, has a lawful permanent resident son, and two lawful permanent resident ailing parents whom she takes care of and who live with her in Houston, Texas. App. C, *infra*. Her husband suffers from diabetes. App. C, *infra*. Her father is 72 years old and suffers from dizzy spells. App. C, *infra*. Her mother is 67 years old and suffers from high blood pressure. App. C, *infra*. Both rely on Petitioner for care. App. C, *infra*. Petitioner also has two U.S. citizen sisters, one lawful permanent

resident sister, and a lawful permanent resident brother living near her. App. C, *infra*.

More importantly, the IJ found Petitioner did not plea and was not convicted of making a false claim to citizenship. App. C, *infra*. Rather, the IJ found that on or about 2006, she was convicted of making a false statement on an application for a U.S. passport. App. C, *infra*. She needed work authorization to continue with her employment. App. C, *infra*. Although she had an opportunity to get work authorization through her husband's visa petition, and because she was ignorant of the law, as interpreted by the IJ, she was misled by an unscrupulous person who assisted her and advised her to apply for a U.S. passport. App. C, *infra*. Petitioner later applied and became a legal permanent resident of the United States after her husband filed a visa petition on her behalf. App. C, *infra*.

On the assumption Petitioner's conviction was one for false claim to citizenship, the Government issued and filed a Notice to Appear with the Immigration Court charging Petitioner as being subject to removal as someone who was not entitled to legal permanent residency when she obtained it because she was inadmissible for her false claim without the possibility of a waiver. After some delays and substitution of charges, the Government charged Petitioner removable pursuant to INA §237(a)(1)(A) as it related to §212(a)(6)(C)(i) and (ii) of the Act. The Immigration Court disagreed with the Government, finding petitioner removable only for making a *misrepresentation*

as charged under §237(a)(1)(A) of the INA as it related to §212(a)(6)(C)(i) but not under subsection (ii), finding the Government failed to establish by clear and convincing evidence that Petitioner falsely represented herself to be a citizen of the United States for any purpose under the Act. Further, the IJ found Petitioner established eligibility for a waiver under INA §237(a)(1)(H) for the misrepresentation and granted her such relief retroactive to the date of her adjustment of status to legal permanent resident.

The Government appealed the IJ's decision to the BIA. Inexplicably, the BIA ignored the IJ's findings of fact, disregarded the evidence in the record, substituted the facts for their own, and only considered their own. The BIA found that Petitioner's conviction supported a charge to making a false claim to citizenship under §237(a)(1)(A) of the INA as it relates to §212(a)(6)(C)(ii) for which there is no waiver available and ordered Petitioner removed from the country.

Petitioner timely filed a petition for review of the BIA's decision with the Fifth Circuit Court of Appeals initially complaining the BIA erred when it conducted *de novo* review and substituted their own findings of fact. Petitioner also complained and argued the BIA erroneously concluded her conviction supported a charge of making a false claim to U.S. citizenship. The Fifth Circuit found no jurisdiction to review whether the BIA erred in conducting *de novo* review of the IJ's findings by engaging in its own fact finding because Petitioner had allegedly failed to exhaust remedies by not first presenting the new issues raised

by the BIA in a motion to reopen or to reconsider before the BIA. After admitting that the BIA, the agency in charge of interpreting the statute had not issued proper guidance or a ruling on whether intent is required to make a false claim to citizenship to procure a benefit, the Fifth Circuit avoided the important issue of deciding if intent or scienter was an implied requirement to false claim of citizenship. Finally, the court concluded Congress was ambiguous on the issue of the statute requiring a willful and knowing misrepresentation of citizenship. Relying on *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) the Fifth Circuit found it had to grant deference to the agency's interpretation of the statute since Congress was ambiguous, affirmed the BIA and ordered Petitioner deported.

Petitioner timely files the instant petition for *writ of certiorari* asserting this Court's review is plainly warranted in light of: (1) the Fifth Circuit exhaustion of remedies requirement of filing motions to reopen and reconsider as a prerequisite to judicial review; (2) the contrary decision from the Ninth Circuit decision; (3) the likelihood of three other circuits following and narrowly interpreting this Court's decision in *Bowles*; (4) eight circuits which so far do not require a motion to reopen or reconsider to be exhausted as a prerequisite to review; (5) the failure of the BIA to follow its own regulations; (6) and the four circuit decisions contrary to this Court's precedent decision in *Kungy's* which have found intent is not required when making a false claim to U.S. citizenship.

## C. Procedural History

The removal proceedings were commenced by the filing of a Notice to Appear (hereinafter "NTA") dated April 4, 2006. The allegations of fact are not at issue but the charges of removability under the NTA are. After many amendments, Petitioner was finally charged as removable under INA §237(a)(1)(A) as it relates to INA §212(a)(6)(C)(i) (fraud or willful misrepresentation of a material fact) and (ii) (false claim to U.S. citizenship).

### (1) Before the Immigration Judge

At a master calendar hearing, the IJ found Petitioner removable under INA §237(a)(1)(A) of the Act as it relates to INA §212(a)(6)(C)(i) (fraud or willful misrepresentation of a material fact) of the Act but not as it relates to INA §212(a)(6)(C)(ii) (false claim to U.S. citizenship). As to relief from removal, Petitioner filed for a waiver of inadmissibility under INA §237(a)(1)(H). After finding the Petitioner did not make a false claim to citizenship, the IJ granted the waiver retroactive to the time of her admission as a legal permanent resident.

### (2) Administrative Appeal

The Government appealed to the BIA complaining about the IJ's grant of the waiver and alleging Petitioner's conviction for making a false statement on a U.S. passport application supported a charge of making a false claim to U.S. citizenship.

The Government alleged Petitioner was ineligible to legal permanent residency when she applied because she was inadmissible as a person convicted of a false claim to citizenship. The BIA inexplicably ignored the IJ's factual findings showing Petitioner did not have the intent required to make a false claim of citizenship, substituted the facts for their own, and only considered those, finding Petitioner's conviction for making a false statement on an application for passport, without evidence of intent, categorically supported a charge of false claim to citizenship. Consequently, the BIA reversed the grant of the waiver by the IJ and ordered Petitioner removed from the country.

**(3) Judicial Review**

Before the Fifth Circuit Court of Appeals, Petitioner argued that the BIA erred when it reversed the IJ, argued that the BIA exceeded its authority when it ignored the IJ's factual findings, substituted them for their own, and only considered those when rendering its decision. Petitioner also argued the BIA erred when it found Petitioner's conviction for making a false statement on a passport application categorically supported a charge for false claim to citizenship. After considering the arguments, the Fifth Circuit Court of Appeals erroneously found no jurisdiction to consider the allegations against the BIA because Petitioner failed to request the BIA reopen and/or reconsider its decision. The court considered the second issue and affirmed the BIA's decision concluding that making a

false statement on a passport application supports a charge for making a false claim to U.S. citizenship without evidence of intent or scienter.

In light of the Circuit split and because the facts of Petitioner's case were not addressed in the Circuit Court's decision, Petitioner timely files the instant petition for *writ of certiorari*.

## ARGUMENT FOR ALLOWING THE WRIT

This Court should grant review because there is a mature and acknowledged conflict among the Courts of Appeals on the same important matters: (1) whether exhaustion of administrative remedies requires as a matter of statutory jurisdiction a motion to reopen or reconsider where the BIA's decision on appeal results in itself in a new issue to be appealed; (2) whether the BIA can engage in its own fact finding on appeal when agency regulation prohibits so; and (3) whether a conviction for making a false statement in an application for a passport supports a charge of inadmissibility for making a false claim of U.S. citizenship without evidence of intent or scienter. The issue is a recurring and important one for the many aliens subject to removal under the Court of Appeals' approach. This case presents a suitable vehicle for resolving the conflicts. Additionally, the Court of Appeals' decisions cannot be squared with the plain terms of the governing statutes. This Court therefore should grant review.

### 1. There is a Clear Conflict Among United States Courts of Appeals on Whether Exhaustion of Remedies Requires the Filing of a Motion to Reopen and/or Reconsider Before the BIA as a Prerequisite to Judicial Review

Petitioner appealed to the Fifth Circuit Court of Appeals the BIA's decision revoking her grant of a waiver. She complained that the BIA exceeded its authority when it engaged in fact finding and only considered those facts on appeal. She also complained of the BIA's finding that she had made a false claim to U.S. citizenship. The Fifth Circuit found no jurisdiction to consider whether the BIA erred in engaging in its own fact finding because statutory exhaustion of remedies required her to exhaust all remedies including the filing a motion to reopen and reconsider when the decision of the BIA results in a new issue to appeal. For the Fifth Circuit to require Petitioner to file a motion to reopen or reconsider the new issues raised in the BIA's decision is not only burdensome but also an unnecessary nuisance. The same type of exhaustion could be required for every decision the IJ or the BIA renders. Motions to reopen and/or reconsider would be never ending. This is not only impractical but dimwitted.

As a prerequisite to judicial review, the statute requires exhaustion of all remedies available "as of right." Under 8 U.S.C. §1252(d)(1), an alien cannot obtain judicial review until he has exhausted all administrative remedies available to the alien as of right and another court has not decided the validity of the order, unless the reviewing court finds that the

petition presents grounds that could not have been presented in the prior judicial proceeding or that the remedy provided by the prior proceeding was inadequate or ineffective to test the validity of the order. Motions to reopen and to reconsider are available and an alien has a right to pursue them. However, they are discretionary rather than mandatory.

The Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") affords judicial review to circuit courts if a petitioner has previously exhausted all administrative remedies available to him as of right. INA §242(d)(1), 8 U.S.C. §1252(d)(1). The Fifth Circuit has found that a remedy is available as of right if: (1) the petitioner could have argued the claim before the BIA, and (2) the BIA has adequate mechanisms to address and remedy such a claim. *Omari v. Holder*, 562 F.3d 314, 318-319 (5th Cir. 2009). Additionally, the Fifth Circuit has also found that an alien meets the exhaustion requirements if he has explicitly raised the issue before the BIA on direct appeal by filing a motion to reopen or reconsider. *Id.* By imposing this additional exhaustion requirement, the Fifth Circuit reasons that an appellant should afford the agency an opportunity to address all arguments including those of its own alleged legal error when the new decision itself results in a new issue.[4]

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[4] Previously the 5th Circuit had found that motions to reopen or reconsider are not remedies available as of right, and thus are not required to be exhausted for review. *Ramirez Osorio v. INS*, 745 F.2d 937, 940 (5th Cir. 1984).

Petitioner in this case properly filed her appeal of the BIA's decision to the Fifth Circuit after exhausting all remedies under the law. Petitioner did not file a motion to reopen and/or reconsider to the BIA because she was not required to do so under the law. The petition with the Fifth Circuit was properly filed pursuant to INA §242, 8 U.S.C. §1252 as amended by §106(d) of the "REAL ID Act" enacted as Division V, Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. 109-13, 119 Stat. 231 (May 11, 2005). This amendment mandates that INA §242 is now the "sole and exclusive means" to review a final removal order, and thus provided the court of appeals with jurisdiction over Petitioner's appeal. While Petitioner's case ultimately involves an application for relief from removal, review is not barred by 8 U.S.C. §1252(a)(2)(B) because the questions presented herein are "questions of law raised upon a petition for review." 8 U.S.C. §1252(a)(2)(D). Under 8 U.S.C. §1252(d)(1), an alien cannot obtain judicial review until he has exhausted all administrative remedies available to the alien as of right and another court has not decided the validity of the order, unless the reviewing court finds that the petition presents grounds that could not have been presented in the prior judicial proceeding or that the remedy provided by the prior proceeding was inadequate or ineffective to test the validity of the order. *Id.*

The statute requires exhaustion of all remedies available "as of right." Motions to reopen and to

reconsider are available but are discretionary and not available as of right, like for example, the right to appeal. An alien may file one motion to reopen, INA §1229a(c)(7)(A), asking the BIA to change its decision because of newly discovered evidence or changed circumstances. Aliens have a right to pursue a motion to reopen or reconsider. *Dada v. Mukasey,* 128 S.Ct. 2307 (2008). This is not mandatory. The regulations provide that the Board "may" reopen and or reconsider but contains no non-discretionary provisions. 8 C.F.R. §1003.2 No circumstances are listed in which such a motion must be granted. *Id.* In this case, Petitioner did not file a motion to reopen and/or reconsider the BIA's decision because she did not seek to introduce newly discovered evidence or point to changed circumstances. Rather, Petitioner properly filed a petition with the Fifth Circuit because she disagreed with the BIA's decision as to her alleged claim of citizenship. While the BIA's decision raised new issues, Petitioner had to file an appeal anyway as to the BIA's finding she made a false claim of citizenship. Requiring Petitioner to first file a motion to reopen and/or reconsider the new issues raised in the BIA's decision as well as an appeal of the false claim of citizenship issue is impractical.

The Fifth Circuit's decision conflicts with this Court's previous decisions. The Fifth Circuit requirement of exhaustion of motions to reopen and reconsider as a jurisdictional requirement prior to judicial review conflicts with this honorable Court's precedent decisions in *INS v. Doherty*, 502 U.S. 314, 112 S.Ct. 719, 116 L.Ed.2d 823 (1992) and *INS v. Abudu*, 485

U.S. 94 (1988). In *Abudu*, this Court held that "[m]otions to reopen are disfavored in deportation proceedings." *Abudu*, at 107, 110 (1988) (noting, among other things, "the tenor of the Attorney General's regulations, which plainly disfavor motions to reopen"), *Id. Abudu* was confirmed in *Doherty, supra.* There, this honorable Court held that "[t]he granting of a motion to reopen is discretionary" but above all, motions to reopen are "*disfavored.*" *Doherty,* 323. Since *Doherty* and *Abudu* confirm that motions to reopen are "discretionary," they cannot be deemed remedies available "as of right," accordingly, they cannot possibly be a statutory prerequisite to judicial review. A motion to reopen may be granted as a matter of discretion, but reopening is not available "as of right," so a motion to reopen and/or reconsider cannot be a prerequisite to judicial review.

The Fifth Circuit decision has also created a circuit split. Contrary to the Fifth Circuit, the Ninth Circuit has expressly held that the filing of a motion to reopen or reconsider is not a jurisdictional prerequisite to filing a petition for review with the court of appeals. *Castillo-Villagra v. INS*, 972 F.2d 1017, 1023-24 (9th Cir. 1992); *see also Noriega-Lopez v. Ashcroft*, 335 F.3d 874, 881 (9th Cir. 2003) (motions to reopen and reconsider are not remedies available as of right and not required for exhaustion). All Circuit Courts recognize statutory exhaustion as a prerequisite to review. Regrettably, the Fifth Circuit is the only circuit requiring a motion to reopen or reconsider

be filed with the BIA when the BIA's decision in itself results in a new issue.[5]

Even if this honorable Court finds that exhaustion of motions to reopen and/or reconsider are indeed a prerequisite to judicial review, an exception should be recognized under the particulars of this case. After this Court's decision in *Bowles v. Russell,* 127 S.Ct. 2360 (2007), four circuits have restrictively interpreted it and found that §242(d)(1) is "jurisdictional" and no other equitable exceptions to exhaustion are valid. *Massis v. Mukasey,* 549 F.3d 631, 638-40 (4th Cir. 2008); *Bah v. Mukasey,* 521 F.3d 857, 859-60 (8th Cir. 2008); *Grullon v. Mukasey,* 509 F.3d 107 (2d Cir. 2007); *Omari, supra.* If confronted with the precise issue of exhaustion of motions to reopen and reconsider as a prerequisite to judicial review, under the restrictive interpretation, these Circuit Courts will have no choice but to follow the Fifth Circuit and require the filing of such motions. *Bowles* does not

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[5] *Valenzuela-Solari v. Mukasey,* 551 F.3d 53, 58 (1st Cir. 2008); *Grullon v. Mukasey,* 509 F.3d 107, 112-14 (2d Cir. 2007); *Barker v. Ashcroft,* 382 F.3d 313, 317 (3d Cir. 2003); *Kporlor v. Holder,* 597 F.3d 222, 226-28 (4th Cir. 2010); *Omari v. Holder,* 562 F.3d 314 (5th Cir. 2009); *Csekinek v. INS,* 391 F.3d 819, 822-23 (6th Cir. 2004); *Ali v. Mukasey,* 542 F.3d 1180, 1183 (7th Cir. 2008); *Frango v. Gonzales,* 437 F.3d 726 (8th Cir. 2006); *Abebe v. Mukasey,* 554 F.3d 1203, 1207-08 (9th Cir. 2009) (*en banc*); *Halmenschlager v. Holder,* 577 F.3d 1122, 1128-30 (10th Cir. 2009) [failure to raise BIA's standard of review regarding fact finding before the BIA]; *Amaya-Artunduaga v. Att'y Gen. of the U.S.,* 463 F.3d 1247, 1249-51 (11th Cir. 2006); *Maalouf v. Wiemann,* 654 F.Supp.2d 6 (D.D.C. 2009).

appear to restrict or annul all circumstances under which exhaustion remedies are not required. The Second and Eighth Circuit Courts recognize exceptions by distinguishing between claim and issue exhaustion, the issue exhaustion not being jurisdictional under INA §242(d)(1) and may be waived. *Zhong v. DOJ,* 480 F.3d 104, 116-25 (2d Cir. 2007). The court in *Zhong* found that the basis for waiver of issue exhaustion has more force in light of streamlining and that failure to raise certain issues should be treated as an affirmative defense and not as a jurisdictional issue. The Eighth Circuit in *Zine v. Mukasey,* 517 F.3d 535, 539-40 (8th Cir. 2008) also noted that claims versus issue exhaustion as an intra- and inter-circuit issue but not resolving it in this case except to note that lawyers must appeal the denial of withholding when appealing denial of asylum. An exception should be carved because issue exhaustion should not be considered jurisdictional.

In light of the Fifth Circuit exhaustion requirement contrary to this Court's precedential decisions and contrary to the Ninth Circuit decision and considering that the remaining twelve Circuits do not require exhaustion remedies by filing motions to reopen and/or reconsider, clarification of *Bowles* and the requirements for exhaustion is absolutely necessary. The competing opinions clearly highlight the arguments on both sides of the issue, and the court of appeals cannot agree. This conflict can only be resolved by this Court.

### 2. The BIA Exceeded Its Authority When It Engaged in Its Own Fact Finding When It Is Specifically Barred from Doing so by Agency Regulation

The BIA engaged in its own fact-finding and completely disregarded all of the factual evidence presented tending to show that Mrs. Barcenas could not have and did not have the requisite intent or scienter required to make a false claim of citizenship. The IJ found Petitioner had limited schooling and was illiterate. The IJ found that she could not read or write. The IJ also found that she was tricked and misled by an unscrupulous person who assisted her and advised her to apply for a U.S. passport. App. C, *infra*. More importantly, the IJ found her conviction was the result of her desire to work in the United States, the result of ignorance of the law, and the result of an unscrupulous person who "led her down the wrong path by obtaining a document that she did not realize would cause her to be convicted." App. C, *infra*. The IJ found petitioner willfully misrepresented a material fact when she claimed she was born in the United States but also found that making such a misrepresentation is not synonymous to making a false claiming of U.S. citizenship. App. C, *infra*. The IJ found that passports can be issued to nationals and also found that the evidence presented indicated Petitioner could have claimed to be a U.S. citizen but did not necessarily indicate she was claiming herself to be a U.S. citizen. App. C, *infra*. The IJ found there was no clear and convincing evidence Petitioner ever

claimed she was a U.S. citizen. App. C, *infra*. The IJ concluded Petitioner could not read or write other than her name, she may recognize her date of birth and that she can read the alphabet. App. C, *infra*. The IJ found the application was filled out by someone else, without Petitioner realizing that she was claiming to be born in the United States or that she was a U.S. citizen. Thus, the IJ found she did not have the scienter required to make a false claim to citizenship. App. C, *infra*.

The BIA ignored all of these facts found by the IJ when it overturned the IJ's decision. Rather, the BIA engaged in its own fact-finding when it found that because Petitioner was convicted of making a false statement on an application for a U.S. passport she made a false claim to citizenship. The BIA did not consider any of the above referenced facts found by the IJ that showed Petitioner never had the intent to make a false claim to citizenship.

The BIA's authority to engage in fact finding on appeal is limited by regulation. The Board's regulations provide, in pertinent part, that "[e]xcept for taking administrative notice of commonly known facts . . . or the contents of official documents, the Board will not engage in fact finding in the course of deciding appeals." 8 C.F.R. §1003.1(d)(3)(iv). The BIA commits reviewable legal error when, in contravention to its own rules, it fails to defer to an IJ's fact finding. Thus, when the BIA engages in fact finding in contravention to 8 C.F.R. §1003.1(d)(3)(iv), it commits an error of law, which the Court of Appeals

had jurisdiction to correct. The Fifth Circuit Court reviews the factual findings of the BIA under the substantial evidence standard reversing only when the evidence compels a contrary result. *Nakimbugwe v. Gonzales*, 475 F.3d 281, 283 (5th Cir. 2007). Had the Court of Appeals reviewed this case carefully, they would have found that the BIA exceeded its authority.

The BIA ignored all of the facts the IJ found which tended to show Petitioner could not have the intent or the scienter required to make a false claim of citizenship. By ignoring them, and substituting their own and only considering their own, the BIA violated its own rules and as such, their fact-finding cannot stand. The BIA simply found that Petitioner applied for a U.S. passport, which she intended to give to her employer to work. App. B, *infra*. Unlike the IJ's analysis, the BIA viewed this fact in isolation from the other facts in Petitioner's case. In doing so, the BIA impermissibly exceeded its authority, which by its own regulations in instances such as these is limited to *de novo* review of questions of law, discretion, and judgment. "[O]ne under investigation with a view to [removal] is legally entitled to insist upon the observance of rules promulgated pursuant to law," *Bridges v. Wixon*, 326 U.S. 135, 153 (1945) (internal quotation marks omitted), and, as such, it is an error of law for the BIA to ignore its own regulations, *see United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954); *see also Vitarelli v. Seaton*, 359 U.S. 535, 547 (1959) (Frankfurter, J., concurring in part and dissenting in part) ("This judicially evolved rule

of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with that sword."); *Montilla v. I.N.S.*, 926 F.2d 162, 166-67 (2d Cir. 1991); 8 C.F.R. §1003.1(d)(1) ("The Board shall resolve the questions before it consistent with the [INA] and [agency] regulations."). As such, the BIA's decision cannot stand.

### 3. The Court Below Erred when It Found that Petitioner's Conviction for False Statement on an Application for a Passport, was Automatically and Categorically a False Claim to U.S. Citizenship

Mrs. Barcenas never claimed to be a U.S. citizen. Mrs. Barcenas was convicted of making a false statement on a passport application. *See* App. C, *infra*. Mrs. Barcenas stated her place of birth to be the United States on the passport application. *Id.* She only did so after she was tricked and misled by an unscrupulous person who assisted her in doing so. *Id.* She did so as a result of ignorance of the law but more importantly as the result of an unscrupulous person who "led her down the wrong path by obtaining a document that she did not realize would cause her to be convicted." *Id.* The IJ found the application was filled out by someone else, without Petitioner realizing she was claiming she was born in the United States or that she was a U.S. citizen. *Id.* Thus, the IJ found she did not have the intent or scienter required to make a false claim to citizenship. *Id.*

Contrary to this Court's precedential decision in *Kungys v. United States,* 485 U.S. 759 (1988), the Fifth Circuit and three other Circuit Courts have upheld decisions finding Petitioners inadmissible as individuals who have made false claims to citizenship after being convicted for making false statements on passport applications without regards to scienter.[6] None of these courts ruled on whether the inadmissibility ground when applied to an alien who provides false information requires evidence of an alien's intent to misrepresent themselves as citizens.

The elements of 18 U.S.C. §1542 to which Petitioner admitted her guilt are: (1) willfully; (2) making a false statement on a U.S. passport application; (3) with the intent to induce or secure the issuance of the passport, contrary to law. *Id.* Here, among other things, Petitioner knowingly misrepresented her place of birth as the United States. Her misrepresentation may have been willful in that it was deliberate and voluntarily made with knowledge of the falsity of the representation. Nevertheless, by applying for a U.S. passport, Petitioner did not necessarily intend to willfully and knowingly represent herself to be a U.S. citizen to obtain a benefit under the Act. This is a question of fact: whether Petitioner had the subjective intent to make such false claim to obtain a

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[6] *Vana v. Attorney General*, 341 F. App'x 836 (3d Cir. 2009); *Jackson Omier v. Gonzales*, 246 F. App'x 1, 1 (1st Cir. 2007); *Rodriguez v. Gonzales,* 451 F.3d 60 (2d Cir. 2006); *Sowah v. Gonzales,* 196 F. App'x 576 (9th Cir. 2006).

benefit. The IJ found that she could not have such intent and as such, that she did not make a false claim to citizenship. App. C, *infra*.

The BIA found Petitioner to be removable under INA §237(a)(1)(A) as it relates to INA §212(a)(6)(C)(ii) of the Act for making a false claim to citizenship. In *Kungys v. United States*, 485 U.S. 759 (1988), this Honorable Court recognized that another section of the INA dealing with false testimony had a subjective intent requirement. In that case, the Court analyzed INA §101(f)(6). This Court found that the section provides "[n]o person shall be found to be a person of good moral character who, during the period for which good moral character is required to be established, is or was . . . (6) A person who has given false testimony for the purpose of obtaining any benefit under the Act." INA §101(f)(6). The Court found this section had a subjective intent requirement. The Court stated as follows:

> Under 8 U.S.C. §1101(f)(6), a person shall be deemed not to be of good moral character if he "has given false testimony for the purpose of obtaining" immigration or naturalization benefits . . . Literally read, it denominates a person to be of bad moral character on account of having given false testimony if he has told even the most immaterial of lies *with the subjective intent of obtaining immigration or naturalization benefits*. We think it means precisely what it says. *Kungys*, 779-780.

As noted above, the language in INA §101(f)(6) is similar if not identical to §212(a)(6)(C)(ii) in that both require the false statement to be made for a particular purpose.[7] Although neither statute uses the word "intentional" or "willful," the "for the purpose" language necessarily implies a subjective intent. In *Kungys*, this Honorable Court remanded the case to the trier of fact to decide whether in making a misrepresentation, the Petitioner possessed the subjective intent of obtaining immigration or naturalization benefits. As the Government acknowledged in *Kungys*:

> It is only dishonesty accompanied by this precise intent that Congress found morally unacceptable. Willful misrepresentations made for other reasons, such as embarrassment, fear, or a desire for privacy, were not deemed sufficiently culpable to brand the applicant as someone who lacks good moral character. *Id.*

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[7] INA §212(a)(6)(C)(i) and (ii), 8 U.S.C. §1182(a)(6)(C)(i) and (ii), which provides: "(i) In general Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this chapter is inadmissible. (ii) Falsely claiming citizenship (I) In general Any alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit under this chapter (including Section 1324a of this title) or any other Federal or State law is inadmissible.

Accordingly, the trier of fact has to determine whether in making the misrepresentations, Petitioner possessed the subjective intent of thereby obtaining immigration or naturalization benefits. *Id.*, *Pullman-Standard v. Swint,* 456 U.S. 273, 288, 102 S.Ct. 1781, 1789-1790, 72 L.Ed.2d 66 (1982) (issues of intent are factual matters for the trier of fact); *Berenyi v. District Director, INS,* 385 U.S. 630, 634-635, 87 S.Ct. 666, 669-670, 17 L.Ed.2d 656 (1967). This is precisely what the IJ did in this case, finding Mrs. Barcenas did not have the scienter required to make a false claim to U.S. citizenship. Rather, the IJ found she was taken advantage of and was a victim of someone else's actions. All she knew was she was getting work authorization by submitting a form. She was tricked, misled and received assistance in preparing and filing the application. She was not aware of what she was filing. She did not possess the subjective intent of making a false claim of citizenship to obtain an immigration benefit.

The Fifth Circuit avoided making a decision on the issue of intent and affirmed the BIA asserting that since the BIA, the agency responsible for administering the statute had not provided clear guidance regarding an alien's intent to misrepresent him or herself as a U.S. citizen, it did not need to decide if intent or scienter was necessary. App. A, *infra*. The Fifth Circuit also found Congress was not ambiguous on the issue of intent because the statute requires a willful and knowing misrepresentation of citizenship. *Id.* Thus, under *Chevron U.S.A. Inc. v. Natural*

*Resources Defense Council*, 467 U.S. 837 (1984), they had to defer to the agency's interpretation of the statute. The Fifth Circuit completely ignored *Kungys, supra,* which clearly recognizes scienter to a false claim of citizenship.

Intervention and resolution by this Court is necessary.

## CONCLUSION

For the reasons shown, Petitioner prays this petition for *writ of certiorari* be granted.

Respectfully submitted,

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## APPENDIX A

## IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No. 09-60536

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OLGA BARCENAS-BARRERA,

Petitioner

v.

ERIC H. HOLDER, JR., U.S. ATTORNEY GENERAL,

Respondent

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Petition for Review of an Order of the
Board of Immigration Appeals
Agency No. A093 086 418

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(Filed Sept. 1, 2010)

Before CLEMENT, SOUTHWICK, and HAYNES, Circuit Judges.

PER CURIAM:*

Olga Barcenas-Barrera, a native and citizen of Mexico, seeks review of a BIA decision reversing the

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

IJ and ordering her removal. In 2006, Barcenas-Barrera pleaded guilty to making a false statement on an application for a United States passport, in violation of 18 U.S.C. § 1542. DHS charged her with several grounds of removability based on the passport application. The IJ sustained one ground, but granted a waiver of inadmissibility based on Barcenas-Barrera's credible testimony and a finding that she was deserving of the court's discretion. On review, the BIA sustained a second ground of removability, to which waiver does not apply, and ordered her removed to Mexico. Ms. Barcenas-Barrera petitioned for review. We hold the BIA's decision that Barcenas-Barrera was removable under 8 U.S.C. § 1227(a)(1)(A) was not an abuse of discretion. Accordingly, we DENY Barcenas-Barrera's petition for review of the BIA's judgment and order of removal.

## FACTS AND PROCEEDINGS

Ms. Barcenas-Barrera is a native and citizen of Mexico. She entered the United States in 1986. In 1988, she married Pedro Barrera, who became a naturalized United States citizen in 2000. Based on this marriage, Barcenas-Barrera adjusted her status to that of lawful permanent resident ("LPR") in September 2004. Before she adjusted her status, Barcenas-Barrera obtained a work permit under a then-existing amnesty program. The work permit expired and she purchased a fake social security card

and birth certificate showing her birthplace as in Texas from a co-worker.[1] When her employer refused to accept those documents, the co-worker then advised Barcenas-Barrera to fill out a United States passport application using the fake documents. Because she is illiterate in both English and Spanish, Barcenas-Barrera had a neighbor complete the form using the information from the fake social security card and birth certificate. Barcenas-Barrera signed the application and submitted it at a United States Post Office. She maintains that she did not understand what she was signing, believed it was a type of work authorization, and did not think that she was claiming to be a United States citizen. The Department of State discovered that both the social security number ("SSN") and birth certificate were false and was investigating when the Department of Homeland Security ("DHS") adjusted Barcenas-Barrera's status to LPR.

In March 2006, Barcenas-Barrera pleaded guilty to making a false statement on an application for a United States passport in violation of 18 U.S.C. § 1542[2] and was sentenced to three years of

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[1] There were legal means for her to continue to work, but Barcenas-Barrera submits that she was unaware of them.

[2] "Whoever willfully and knowingly makes any false statement in an application for passport with intent to induce or secure the issuance of a passport under the authority of the United States, either for his own use or the use of another, contrary to the laws regulating the issuance of passports or the rules prescribed pursuant to such laws."

probation. The claimed false statement was her representation that she was born in Texas. The DHS then instituted removal proceedings, charging her, in relevant part, with removability under 8 U.S.C. § 1227(a)(1)(A), based on both 8 U.S.C. § 1182(a)(6)(C)(i) and (ii). Subsection (i) provides that "[a]ny alien who, by fraud or willfully misrepresenting a material fact, . . . has sought to procure or has procured a visa, other documentation, or admission into the United States or other benefit provided under this chapter is inadmissible." Subsection (ii) provides that "[a]ny alien who . . . has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit under this chapter . . . or any other Federal or State law is inadmissible."

The immigration judge ("IJ") hearing her case found Barcenas-Barrera removable under subsection (i), but not subsection (ii). He then granted a waiver of inadmissability pursuant to 8 U.S.C. § 1227(a)(1)(H).[3] Following DHS's appeal, the Board of Immigration Appeals ("BIA"), found Barcenas-Barrera also removable under subsection (ii) and ordered her removed to Mexico. Barcenas-Barrera petitioned this court for review.

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[3] Removability under 8 U.S.C. § 1182(a)(6)(C)(i), "whether willful or innocent, may . . . be waived for any alien . . . who (i)(I) is the spouse, parent, son, or daughter of a citizen of the United States or of an alien [LPR]; and (II) was in possession of an immigrant visa or equivalent document and was otherwise admissible to the United States at the time of such admission. . . ." Removability under subsection (ii) cannot be waived.

## STANDARD OF REVIEW

We review the BIA's findings of fact for substantial evidence and its legal determinations *de novo*. *Zhu v. Gonzales*, 493 F.3d 588, 594 (5th Cir. 2007). We do not review any part of the IJ's decision that the BIA did not expressly adopt. *Roy v. Ashcroft*, 389 F.3d 132, 137 (5th Cir. 2004). The substantial evidence standard requires us to determine, "not only that the evidence supports a contrary conclusion, but also that the evidence *compels* it." *Chen v. Gonzales*, 470 F.3d 1131, 1134 (5th Cir. 2006) (quotation marks and citation omitted) (emphasis in original). The petitioner bears the burden of showing that "the evidence is so compelling that no reasonable factfinder could reach a contrary conclusion." *Id.* In addition, although the BIA's legal findings are reviewed *de novo*, the court must accord *Chevron* deference to the agency's interpretation of ambiguous immigration statutes. *Smalley v. Ashcroft*, 354 F.3d 332, 335-36 (5th Cir. 2003) (referring to *Chevron USA, Inc. v. Natural Res. Defense Counsel*, 467 U.S. 837, 844 (1984)). *Chevron* requires us to defer to an agency's interpretation if it is based on a permissible construction of the statute and if Congress has not evidenced a clear and unambiguous intent concerning the question before the court. *White v. INS*, 75 F.3d 213, 215 (5th Cir. 1996) (citing *Chevron*, 467 U.S. at 842-43).

## DISCUSSION

Barcenas-Barrera argues that the BIA erred by (1) conducting *de novo* review of the IJ's findings of fact and by engaging in its own fact finding, and (2) concluding that Barcenas-Barrera made a false representation of United States citizenship within the meaning of 8 U.S.C. § 1182(a)(6)(C)(ii). To evaluate these claims, we first analyze whether Barcenas-Barrera properly exhausted her two claims. Then, because we conclude that she did not exhaust the first, but did exhaust the second, we proceed to the merits of the second issue only.

### I. Administrative Exhaustion

The Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") affords this court jurisdiction over Barcenas-Barrera's request for review only if she has "exhausted all administrative remedies available to [her] as of right" on these issues. 8 U.S.C. § 1252(d)(1). "A remedy is available as of right if (1) the petitioner could have argued the claim before the BIA, and (2) the BIA has adequate mechanisms to address and remedy such a claim." *Omari v. Holder*, 562 F.3d 314, 318-19 (5th Cir. 2009). In this circuit, an alien meets the exhaustion requirement only if she has "explicitly" raised the issue before the BIA on direct appeal, a motion to reopen, or a motion for reconsideration. *Id.* at 320-21 (discussing a motion for reconsideration); *see also Toledo-Hernandez v. Mukasey*, 521 F.3d 332, 334 (5th

Cir. 2008) (addressing direct appeal or motion to reopen); *Heaven v. Gonzales,* 473 F.3d 167, 177 (5th Cir. 2006) (same). That "the BIA had sufficient notice of – and opportunities to address – the issues" presented is not sufficient to give this court jurisdiction. *Omari,* 562 F.3d at 321. This rule "provid[es] the BIA with adequate notice of those issues it should address" and affords "the agency with the expertise in immigration matters [] with the opportunity" to address all arguments, "including those of its own alleged legal error." *Id.*

Accordingly, we are without jurisdiction to address whether the BIA erred by conducting *de novo* review of the IJ's findings of fact and by engaging its own fact finding. *See* 8 U.S.C. § 1252(d)(1). Barcenas-Barrera argues that the BIA made legal errors in its decision; these arguments could have been presented to the BIA on a motion to reopen or for reconsideration. *See Omari,* 562 F.3d at 319-21. The BIA has mechanisms adequate to address and remedy these types of errors. *Id.* (citing 8 C.F.R. § 10003.2). Rather than giving the BIA an opportunity to address these questions, however, Barcenas-Barrera resorted directly to this court, depriving us of authority to consider them. *See id.* at 319-20 (finding no jurisdiction to review whether BIA erred "by making its own factual findings instead of properly deferring to those of the IJ" because alien did not first present question to BIA in motion to reopen or for reconsideration).

We do, however, possess jurisdiction to review the BIA's conclusion that Barcenas-Barrera made a false

representation of United States citizenship under 8 U.S.C. § 1182(a)(6)(C)(ii). The DHS directly presented this question to the BIA, which reversed the IJ's conclusion that Barcenas-Barrera was not removable under this section. *In re Barcenas-Barrera,* 25 I&N Dec. 40, 42 (BIA 2009) (finding that subsection (ii) "is broadly defined and encompasses the respondent's representation on her passport application that she was born in Texas"). This is sufficient to satisfy § 1252(d)(1). *Omari,* 526 F.3d at 320. We also have jurisdiction to consider Barcenas-Barrera's more specific argument that the BIA erred in concluding that she satisfied subsection (ii)'s intent requirement. In her brief to the BIA, Barcenas-Barrera argued that subsection (ii) contains an intent requirement. She thus met her obligation to "'raise,' 'present,' or 'mention' [the] issue to the BIA to satisfy exhaustion," *Omari,* 526 F.3d at 321 (collecting cases). Because this question was presented to the BIA on direct appeal, she was not required to move for reconsideration or to reopen in order to exhaust it. *Omari,* 526 F.3d at 320. We therefore proceed to the merits of this issue.

## II. False Representation of United States Citizenship Under 8 U.S.C. § 1182(a)(6)(C)(ii)

Before we analyze this question, we first note the parties' arguments regarding the applicable standard of review. The DHS submits that Barcenas-Barrera presents a question of law, while she alternately argues that it is a legal question and a factual

question. Her arguments that it is a question of fact are incorrect. They merely assume the answer to a legal question-whether subsection (ii) contains an implied intent requirement-in her favor, and proceed to argue that the facts do not show that she possessed the required intent. As this court recently noted, "an IJ's finding about what happened to [an] individual constitutes a factual finding" but its finding "that those facts rise to the level [necessary to meet the statutory requirements] constitutes a legal question." *Ramirez v. Holder,* No. 08-60350, 2010 WL 1287069, at *1 (5th Cir. April 5, 2010). Barcenas-Barrera alleges that the BIA erred in deciding that the facts of her case satisfy subsection (ii): a legal question regarding the BIA's interpretation of a statute it is responsible for administering.[4]

When we review the BIA's construction of such statutes, we are obligated to defer to its interpretations, unless Congress has shown an unambiguous intent concerning the question or the agency's interpretation is not based on a permissible construction of the statute. *White,* 75 F.3d at 215 (citing *Chevron,* 467 U.S. at 842-43). We may reject an interpretation that is "arbitrary, capricious, or manifestly contrary to the statute," but may not substitute our judgment for

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[4] The IIRIRA provides that "[t]he Secretary of Homeland Security shall be charged with the administration and enforcement" of the statute and that the "determination and ruling by the Attorney General with respect to all questions of law shall be controlling." 8 U.S.C. § 1103(a)(1).

that of the BIA. *Chevron,* 467 U.S. at 844. With this in mind, we review the substance of the BIA's decision on this issue.

The BIA, presented with the question of whether Barcenas-Barrera was inadmissible under 8 U.S.C. § 1182(a)(6)(C)(ii) at the time she converted to LPR, concluded that the "falsely represented, himself or herself to be a citizen of the United States" language of subsection (ii) "is broadly defined and encompasses the respondent's representation on her [signed] passport application that she was born in Texas." *In re Barcenas-Barrera,* 25 I&N Dec. 40, 42 (BIA 2009). It did not explicitly answer Barcenas-Barrera's argument that subsection (ii) only applies to those aliens who "willfully and knowingly" misrepresented themselves as citizens. Portions of its decision indicate that it may have interpreted subsection (ii) not to require a willful and knowing false misrepresentation.[5] Other portions, however, support a conclusion that the BIA interprets subsection (ii) to require some evidence of the alien's intent to misrepresent herself, but that it found the evidence against Barcenas-Barrera was sufficient to satisfy the intent requirement.[6]

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[5] It expressly distinguished this from criminal statutes containing an express intent requirement, because conviction under those statutes requires the government to satisfy a higher burden of proof.

[6] It noted that, by pleading guilty to a § 1542 violation, Barcenas-Barrera had admitted to willfully and knowingly

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We have not previously addressed the presence of an intent requirement in subsection (ii) or this section's application to an alien who has made a misrepresentation in a passport application. Four of our sister circuits, however, have upheld BIA decisions finding inadmissible under subsection (ii) aliens who falsely represented their circumstances of birth in passport applications in ways that implied United States citizenship. *See Vana v. Attorney General,* 341 F. App'x 836, 839 (3d Cir. 2009); *Jackson-Omier v. Gonzales,* 246 F. App'x 1, 1 (1st Cir. 2007); *Rodriguez v. Gonzales,* 451 F.3d 60, 65 (2d Cir. 2006); *Sowah v. Gonzales,* 196 F. App'x 576, 577 (9th Cir. 2006). Only one of these cases involved an intent argument like Barcenas-Barrera's. *Vana,* 341 F. App'x at 838. In the other three, the aliens did not dispute that they had intended to misrepresent themselves. In *Vana,* the Third Circuit rejected Vana's argument "that 'scienter' is an implied requirement of a 'false claim of United States citizenship.'" 341 F. App'x at 838 (addressing alien's assertion that he had not intended to represent himself as a United States citizen, but merely "allowed someone to file a passport application for him because he had been told [it] would give him the right to work"). The court in *Vana* did not

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providing false information regarding her birth place with the intent to secure a passport contrary to law. *In re Barcenas-Barrera,* 25 I&N Dec. 40, 43 (BIA 2009). It also found that a passport would "have allowed the respondent to maintain employment in this country, which is the reason she applied for it." *Id.* at 44.

conduct a full analysis of the argument, relying instead on a Second Circuit decision that did not need to explore the intent issue because the alien admitted intent. *Id.* (citing *Rodriguez,* 451 F.3d at 65 (relying on alien's admission of falsely representing himself as a citizen). There is no clear ruling by any of the circuits addressing whether subsection (ii), when applied to an alien who falsely represented his or her circumstances of birth in a passport application in a manner that implied United States citizenship, requires evidence of an alien's intent to misrepresent himself as a United States citizen.

This court, however, need not decide this issue. The BIA has not provided clear guidance regarding its intended interpretation of this statute, which it is responsible for administering, and about which it – rather than this court – possesses expertise. It is also apparent from the BIA's decision that the agency had before it more than sufficient evidence from which to determine that Barcenas-Barrera possessed any intent that subsection (ii) may require.

The BIA did not err in concluding that Barcenas-Barrera made a false representation of United States citizenship within the meaning of subsection (ii). The BIA concluded that subsection (ii) had a "broad" application and that Barcenas-Barrera's conduct amounted to a false representation of citizenship under that statute. The BIA did not err if it found it necessary to conclude that Barcenas-Barrera willfully and knowingly made a false representation of United States citizenship.

This court owes *Chevron* deference to the BIA's interpretation of the statute. Because Congress has not evidenced an unambiguous intent on the issue of whether subsection (ii) requires a willful and knowing misrepresentation of citizenship, we owe *Chevron* deference to the agency's interpretation and may only reject it if we determine that it is "arbitrary, capricious, or manifestly contrary to the statute." *White,* 75 F.3d at 215 (quoting *Chevron,* 467 U.S. at 844). The BIA noted that, by pleading guilty to a § 1542 violation, Barcenas-Barrera had admitted that she (1) willfully (2) made a false statement on a United States passport application, (3) with the intent to induce or secure the issuance of a passport, contrary to law. *See* 18 U.S.C. § 1542. It also recognized that she made assertions on a passport application that, if true, would have entitled her to United States citizenship, barring unusual exceptions that she never argued apply. She then signed a certification[7] that, by implication, affirmed that she was a citizen or national of the United States. The record clearly shows more evidence of Barcenas-Barrera's intent than the mere "checking of a box." *See United States v. Mulumba,* 162 F. App'x 274, 275 (5th Cir. 2005) (holding alien's checking of a box certifying that he

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[7] "I have not, since acquiring United States citizenship, performed any of the acts listed under "Acts or Conditions" on the reverse of this application (unless explanatory statement is attached). I solemnly swear (or affirm) that the statements made on this application are true and the photograph attached is a true likeness of me."

was "[a] citizen or national of the United States" on an I-9 Employment Eligibility Verification Form insufficient evidence of intent to misrepresent himself as a citizen to satisfy a "beyond a reasonable doubt" standard).

In the absence of more specific guidance from the BIA, we do not decide specifically whether § 1182(a)(6)(C)(ii) requires evidence of the alien's intent to falsely claim United States citizenship and, if so, how much evidence it requires. While we have recognized that remand to the BIA for clarification of its decisions is possible and proper, *see Ismail v. Gonzales*, 245 F. App'x 366, 369 (5th Cir. 2007) (citing *INS v. Ventura*, 537 U.S. 12, 16 (2002)), we need not pursue that course here because of the volume of evidence specifically noted in the BIA's decision. Barcenas-Barrera's conduct is more than sufficient to establish that, if evidence of an alien's intent is required to make her inadmissible under subsection (ii), the BIA's determination that she possessed that intent was reasonable.

## CONCLUSION

For the reasons set forth above, we DENY Barcenas-Barrera's petition for review of the BIA's judgment and order of removal.

## APPENDIX B

25 I&N Dec. 40 (BIA 2009) Interim Decision #3647

**Matter of Olga BARCENAS-BARRERA, Respondent**

File A093 086 418 – Houston, Texas

*Decided June 19, 2009*

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

(1) An alien who willfully and knowingly makes a false representation of birth in the United States on a passport application is inadmissible under section 212(a)(6)(C)(ii)of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(6)(C)(ii) (2006), for making a false representation of United States citizenship.

(2) The respondent, who was convicted of violating 18 U.S.C. § 1542 (2006) for falsely representing that she was born in the United States on an application for a passport, is removable under section 237(a)(1)(A) of the Act, 8 U.S.C. § 1227(a)(1)(A) (2006), as an alien who was inadmissible at the time of her adjustment of status under section 212(a)(6)(C)(ii) of the Act.

FOR RESPONDENT: Charissee L. Garza, Esquire, Bellaire, Texas

FOR THE DEPARTMENT OF HOMELAND SECURITY: Merilee Fong, Assistant Chief Counsel

BEFORE: Board Panel: GRANT, MILLER, and MALPHRUS, Board Members.

MALPHRUS, Board Member:

In a decision dated March 29, 2007, an Immigration Judge found that the respondent is not removable under section 237(a)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(1)(A) (2006), as an alien who was inadmissible at the time of her adjustment of status under section 212(a)(6)(C)(ii) of the Act, 8 U.S.C. § 1182(a)(6)(C)(ii) (2006),because she had not falsely represented herself to be a United States citizen.[1] The Department of Homeland Security ("DHS") has appealed from the Immigration Judge's determination that the respondent was not inadmissible under that section. The appeal will be sustained.

## I. FACTUAL AND PROCEDURAL HISTORY

The respondent is a native and citizen of Mexico. In March 2003, she applied at a United States Post Office for a United States passport,[2] which she

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[1] The Immigration Judge did, however, find that the respondent was inadmissible at the time of her adjustment of status under section 212(a)(6)(C)(i) of the Act, as an alien who sought to procure a United States passport by fraud or willful misrepresentation of a material fact. He also granted her request for a waiver of inadmissibility under section 237(a)(1)(H) of the Act, which is available to waive the grounds of inadmissibility under section 212(a)(6)(C)(i), but not under section 212(a)(6)(C)(ii).

[2] The Secretary of State has the authority to issue passports, which has been delegated to selected agents, including duly designated postal employees, who have the authority to

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intended to give her employer as proof that she had authorization to work. She had previously provided her employer a false social security card and birth certificate, which the employer had rejected as invalid. The passport application, which she signed under oath, states that she was born in "Edinburg, TX." The respondent's status was adjusted to that of a lawful permanent resident in September 2004, based on her marriage to a naturalized United States citizen.

In March 2006, the respondent was convicted of making a false statement on an application for a passport in violation of 18 U.S.C. § 1542, for which she was sentenced to 3 years' probation.[3] Count one of the indictment to which the respondent pled guilty states that on or about March 12, 2003, she:

> willfully and knowingly made a false statement in an application for a passport with intent to induce and secure for her own use

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accept passport applications and administer oaths in connection with such applications. *See United States v. Salinas*, 373 F.3d 161, 162 (1st Cir. 2004).

[3] According to 18 U.S.C. § 1542 (2006):

> Whoever willfully and knowingly makes any false statement in an application for passport with intent to induce or secure the issuance of a passport under the authority of the United States, either for his own use or the use of another, contrary to the laws regulating the issuance of passports or the rules prescribed pursuant to such laws . . .
>
> Shall be fined under this title, imprisoned . . . , or both.

> the issuance of a passport under the authority of the United States, contrary to the laws regulating the issuance of such passports and the rules prescribed pursuant to such laws, in that in such application the defendant stated that her place of birth was "Edinburg, TX," which statement she knew to be false.

The record contains a copy of page 3 of the respondent's passport application, which lists her place of birth as "Edinburg, TX." Immediately above the respondent's signature, the application includes a warning that it should not be signed until requested to do so by the person administering the oath, as well as the following affirmation:

> I have not, *since acquiring United States citizenship*, performed any of the acts listed under "Acts or Conditions" on the reverse of this application form (unless explanatory statement is attached). I solemnly swear (or affirm) that the statements made on this application are true and the photograph attached is a true likeness of me.

(Emphasis added.)

## II. ANALYSIS

The DHS argues that clear and convincing evidence establishes that the respondent is removable under section 237(a)(1)(A) of the Act because she was inadmissible at the time of her adjustment of status under section 212(a)(6)(C)(ii). With a limited

exception not applicable in this case, that section provides for the inadmissibility of "[a]ny alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit under this Act (including section 274A) or any other Federal or State law." Section 212(a)(6)(C)(ii) of the Act.

We agree with the DHS that the respondent was inadmissible under section 212(a)(6)(C)(ii) of the Act at the time of her adjustment of status, because the record contains clear and convincing evidence establishing that she falsely represented herself to be a United States citizen for the purpose of obtaining a benefit under the Act or any other Federal or State law. This provision is broadly defined and encompasses the respondent's representation on her passport application that she was born in Texas. It is undisputed that the respondent signed the application, and the Immigration Judge found that she willfully misrepresented on the application that she was born in Texas. As noted above, by signing the passport application the respondent affirmed that she had "acquir[ed] United States citizenship."

Moreover, the respondent's conviction establishes that she willfully and knowingly provided the false information regarding her place of birth on the passport application. *See, e.g.*, *United States v. George*, 386 F.3d 383, 389 (2d Cir. 2004) (holding that a conviction under 18 U.S.C. § 1542 requires that a defendant has provided in a passport application information that he or she knows to be false); *United*

*States v. Suarez-Rosario*, 237 F.3d 1164, 1167 (9th Cir. 2001) (stating that "under the terms of 18 U.S.C. § 1542, the government must prove that the defendant made a willful and knowing false statement in an application for a passport or made a willful and knowing use of a passport secured by a false statement"). The fact that the respondent pled guilty to violating 18 U.S.C. § 1542 precludes her from claiming that she did not knowingly submit false information to obtain a passport. *See Rodriguez v. Gonzales*, 451 F.3d 60, 65 (2d Cir. 2006) (determining that an alien who pled guilty to a violation of 18 U.S.C. § 1542 was inadmissible under section 212(a)(6)(C)(ii) of the Act and was therefore precluded from receiving adjustment of status); *see also Pichardo v. INS*, 216 F.3d 1198, 1201 (9th Cir. 2000) (holding that a conviction under 18 U.S.C. § 911 for making a false claim of United States citizenship established an independent ground for the alien's inadmissibility under section 212(a)(6)(C)(ii) of the Act).[4]

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[4] We recognize that in *United States v. Karaouni*, 379 F.3d 1139 (9th Cir. 2004), the United States Court of Appeals for the Ninth Circuit reversed a defendant's criminal conviction for making a false claim to United States citizenship under 18 U.S.C. § 911, where the sole evidence was that he checked a box on an employment form indicating that he was a "citizen or national of the United States." However, *Karaouni* is distinguishable from this case, in part because it involved a criminal statute that carries the higher burden of proof of guilt beyond a reasonable doubt. *See Theodros v. Gonzales*, 490 F.3d 396, 401 n.7 (5th Cir. 2007).

We disagree with the Immigration Judge's conclusion that the respondent's false representation on a passport application that she was born in Texas does not amount to a claim to be a United States citizen because a noncitizen national can apply for and receive a passport. While a national may be eligible for a passport, *see* 22 C.F.R. §§ 51.1(l), 51.2(a) (2009), the respondent never claimed to be a "national," a term that has historically "referred only to noncitizens born in territories of the United States." *Fernandez v. Keisler*, 502 F.3d 337, 349 (4th Cir. 2007); *see also Matter of Navas-Acosta*, 23 I&N Dec. 586, 587 (BIA 2003). *See generally* sections 101(a)(22), 308 of the Act, 8 U.S.C. §§ 1101(a)(22), 1408 (2006). The respondent claimed to have been born in Texas, not in a territory. The Fourteenth Amendment to the United States Constitution provides that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[5]

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[5] We note that a person born in the United States is both a citizen and national of the United States at birth unless the individual is not "subject to the jurisdiction" of the United States. Section 301(a) of the Act, 8 U.S.C. § 1401(a) (2006). This limited exception refers generally to individuals born to foreign diplomats or to enemies within the United States during a hostile occupation of part of the territory of the United States. *United States v. Wong Kim Ark*, 169 U.S. 649, 473-74 (1898). There is no basis to include the respondent within this very narrow group, and even if there were, such an individual is not a citizen or national and is therefore not eligible to receive a United States passport. *See* 22 C.F.R. §§ 51.1(l), 51.2(a)

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Therefore the respondent's statement on her passport application that she was born in Texas would not be consistent with a claim to be a noncitizen national.

Section 212(a)(6)(C)(ii) of the Act applies to misrepresentations committed for any purpose or benefit under the Act or any other Federal or State law. Obtaining a United States passport is clearly a benefit within the scope of this section. A passport affords the bearer the benefit of being able to leave and enter the United States. *See Jamieson v. Gonzales*, 424 F.3d 765, 768 (8th Cir. 2005) (holding that obtaining entry to the United States by claiming to be a citizen of this country is a "benefit" under the Act); *cf.* section 215(b) of the Act, 8 U.S.C. § 1185(b) (2006) (requiring a United States citizen to have a valid passport to depart from or enter the United States unless otherwise provided). A United States passport would also have allowed the respondent to maintain employment in this country, which is the reason she applied for it.[6] Further, possession of a valid United States passport is a sufficient basis in itself to terminate immigration proceedings. *See Matter of Villanueva*, 19 I&N Dec. 101, 103 (BIA 1984) (finding that a valid United States passport issued to an individual as a citizen of

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(providing that a passport may be issued only to a United States citizen or a noncitizen national).

[6] Section 212(a)(6)(C)(ii) specifically contemplates including as a "benefit" under the Act those benefits available pursuant to section 274A of the Act, 8 U.S.C. § 1324a (2006), which relates to alien employment.

the United States constitutes conclusive proof of that person's citizenship unless the passport is void on its face). Thus, a passport is clearly a "benefit" under the immigration laws, both as proof of United States citizenship and as a means to enter and be employed in this country.

We find by clear and convincing evidence that the respondent is removable under section 237(a)(1)(A) as an alien who was inadmissible at the time of her adjustment of status under section 212(a)(6)(C)(ii) of the Act. Section 237(a)(1)(H) of the Act does not waive inadmissibility under section 212(a)(6)(C)(ii). Nor has the respondent applied for or established her eligibility for any other form of relief from removal. Accordingly, the DHS's appeal will be sustained, and the respondent will be ordered removed from the United States.

**ORDER:** The appeal of the Department of Homeland Security is sustained.

**FURTHER ORDER:** The respondent is ordered removed from the United States to Mexico.

## APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
Houston, Texas

File No.: A 93 086 418 March 29, 2007

| | | |
|---|---|---|
| In the Matter of<br>OLGA BARCENAS-BARRERA<br>Respondent | )<br>)<br>)<br>) | IN REMOVAL PROCEEDINGS |

CHARGES: Section 237(a)(1)(A) as it relates to Section 212(a)(6)(C)(i); 212(a)(6)(C)(ii).

APPLICATIONS: Waiver pursuant to Section 237(a)(1)(H); adjustment of status with waiver pursuant to Section 212(i).

ON BEHALF OF RESPONDENT:

Charissee L. Garza, Esquire
4545 Bissonnet Suite 132
Bellaire, TX 77401

ON BEHALF OF DHS:

Merilee Fong, Esquire
Assistant Chief Counsel
Department of Homeland Security
Houston, TX

FINDINGS, ORAL DECISION, AND ORDER

Respondent is a 49-year-old female, married, native and citizen of Mexico, whose status was adjusted to that of a lawful permanent resident on September 23, 2006, under Section 245 of the

Immigration and Nationality Act. The Government alleged that the respondent was, on or about March 12, 2003, represented herself to be a citizen of the United States for the purpose of obtaining a United States passport. Based upon that violation, the Government issued a charging document, called a Notice to Appear, dated April 4, 2006, alleging the above facts and charging the respondent as removable pursuant to Section 237(a)(3)(D) of the Immigration and Nationality Act. On July 26, 2006, the Government filed Form I-261 substituting the original charge by Section 237(a)(1)(A) of the Immigration and Nationality Act as it relates to Section 212(a)(6)(C)(ii) of the Immigration and Nationality Act.

On August 2, 2006, the respondent, through prior counsel, admitted to all the allegations, but denied that she was removable as charged under 237(a)(3)(D) and also denied that she was removable pursuant to Section 237(a)(1)(A) as it relates to Section 212(a)(6)(C)(ii) of the Act. In support of the allegations and charge, the Government submitted the criminal record without objection, which may be found as Exhibit No. 3.

The case was thereafter scheduled to September 8, 2006 on the issue of removability. The Government submitted additional documents, tabs A, B, and C, which may be found as group Exhibit No. 4, admitted into the record without objection. At the rescheduled hearing on September 8, 2006, respondent, through current counsel, denied the original allegation no. 4, and, again, denied the charges of removability. Based upon a motion for a continuance, the case was

thereafter continued to November 8, 2006. On September 29, 2006, Government filed yet another Form I-261, adding allegations 5 and 6, and adding the charge of removability under Section 237(a)(1)(A) as it relates to Section 212(a)(6)(C)(i) of the Immigration and Nationality Act.

At the rescheduled hearing on November 8, 2006, respondent, through counsel, admitted to allegations 5 and 6, but denied the additional charge as it relates to Section 212(a)(6)(C)(i) of the Act. Court, on that date, found the respondent removable as charged under Section 237(a)(1)(A) of the Immigration and Nationality Act as it relates to Section 212(a)(6)(C)(i) of the Act, and therefore sustained that charge of removability. Government counsel, on that date, re-moved to reinstate the charge under Section 237(a)(3)(D), the original charge in the Notice to Appear. The Court did not sustain that charge finding that the Government had failed to establish by clear and convincing evidence that the respondent falsely represented herself to be a citizen of the United States for any purposes under the Act, or Federal or State law. Case was thereafter continued for trial on respondent's identified relief in the form of adjustment of status and a waiver under Section 212(i) of the Act and also for a waiver under 237(a)(1)(H) of the Immigration and Nationality Act.

The respondent filed her application for a waiver under Section 237(a)(1)(H) of the Act and the supporting documents, such application at trial stipulated by the Government is not necessary for a waiver under

237(a)(1)(H). However, if respondent were pursuing an application for a waiver under Section 212(i) of the Act, that would have been a proper application. Parties also at trial stipulated that if respondent were granted a waiver under Section 237(a)(1)(H), respondent would not have to rely on a waiver under Section 212(i), which in this case would require an adjustment of status.

The Government, on January 18, 2007, again filed yet a third Form I-261 dated January 18, 2007, with two new allegations, 7 and 8, and re-served the charge or charges relating to 212(a)(6)(C)(ii) through Section 237(a)(1)(A) and also removability under Section 237(a)(3)(D) of the Immigration and Nationality Act. On March 29, 2007, the Government counsel again withdrew the charge under Section 237(a)(3) (D) of the Immigration and Nationality Act. Respondent denied allegation no. 7 because of the reference to a birth certificate number. That number, apparently, is reflected in a report, which may be found in group Exhibit 11 tab F, a document issued by the Bureau of Diplomatic Security that was admitted without objection. Apparently, that document is an investigative report relating to respondent's underlying conviction. Accordingly, the Court sustained that allegation. Respondent denied allegation no. 8. The Court did not sustain that allegation because the evidence does not support the legal conclusion in that allegation. That allegation is not supported by facts in this case. The Court again did not sustain the charge of removability relating to Section

212(a)(6)(C)(ii), and again found the Government failed to establish by clear and convincing evidence that the respondent falsely claimed to be a United States citizen.

Trial on respondent's application for a waiver under Section 237(a)(1)(H) of the Act was held and completed on March 29, 2007. The respondent was the only witness to testify in support of her application. The Court would note that respondent's husband and son were present, ready, willing, and able to testify in support of the respondent's waiver application. At the end of the respondent's testimony, parties stipulated that the respondent would be eligible for the waiver under Section 237(a)(1)(H) of the Act except for the fact that the respondent, according to the Government, is statutorily ineligible for adjustment of status based upon her false claim to U.S. citizenship and, therefore, she is removable pursuant to Section 237(a)(1)(A) as it relates to Section 212(a)(6)(C)(ii) of the Act.

The Court also finds, based upon the credible testimony presented by the respondent, that she deserves the Court's exercise of discretion in her favor. Respondent has been residing in the United States since about 1986 when she was approximately 29 or 30 years of age. She has a United States citizen husband, a lawful permanent resident son, and two lawful permanent resident parents living with her. She also has two United States citizen sisters, one lawful permanent resident sister and a lawful permanent resident brother living near her in Conroe,

Texas. Respondent also has three other brothers living in the United States, who do not have any lawful status. The respondent has been working in the United States since 1991, except for approximately one to two years, apparently when she gave birth to her children. The respondent owns a home in Conroe and another vacant lot with a mobile trailer. Respondent attends church regularly and donates money to her church. Her father is 71 years of age, suffering dizzy spells, but apparently has not had an opportunity to be fully examined by a doctor. Her mother is 67 years of age, and has high blood pressure issues. Her husband is a diabetic, since approximately seven years ago. Respondent testified that she assists him in going to the doctor, and with his blood sugar-level tests approximately twice a day. Her some [sic] has some facial paralysis condition, since approximately 2003. The doctor examined him and indicates that it is probably from stress, and he needs to be carefully monitored because the situation could reoccur. Respondent provides him with the required therapy on a daily basis. His condition has gotten better, but there is still a minor problem with the facial paralysis. Testimony indicates that the family is a close unit, living in the same area, in Conroe, Texas.

Weighing against the respondent's undesirability for a grant is the fact that she applied for a passport claiming that she was born in Edinburg, Texas. As a result, she was arrested and convicted for the offense. The sentence includes three years of probation and a

requirement to obtain GED. The respondent, apparently, has been compliant with the conditions of probation. There is no evidence of violation. She has completed approximately a year or so of her probation. And although she only has two years of education, and does not read or write, she is still complying with the requirement and is attending classes in order to obtain her GED. Based upon the totality of the circumstance, the Court finds that her situation, apparently, is a result of her desire to continue to work in the United States. Apparently, although she had an opportunity to get work authorization through her husband's visa petition and through applying for adjustment of status, because of her ignorance of the law, she listened to some unscrupulous person, who led her down the wrong path by obtaining a document that she did not realize that would cause her the resulting conviction.

Under the circumstance, the Court would find that the respondent should be given an opportunity to remain in the United States, and therefore, would grant her application for a waiver under Section 237(a)(1)(H) of the Act if she were otherwise eligible. As the Government had stipulated that she would otherwise be eligible for that waiver, the Government has not raised any other issue that would affect the Court's determination in that regard.

Remaining before the Court, and most importantly, is whether or not the respondent is removable pursuant to Section 237(a)(1)(A) of the Act as it relates to Section 212(a)(6)(C)(i) and Section 212(a)(6)(C)(ii) of

the Immigration and Nationality Act. The Court finds that the respondent's conviction is, in fact, a conviction for an offense relating to obtaining a document by fraud or willful misrepresentation of a material fact. Respondent knew that she was not born in Edinburg, Texas. Respondent put that information on her passport application in order to obtain a passport, which is a travel document and a document that would also allow her to be admitted to the United States. The Court finds that she filed that application by willfully misrepresenting a material fact. Under the circumstance, the Court finds that the Government has carried its burden in that charge.

Most importantly is whether or not respondent is also removable relating to Section 212(a)(6)(C)(ii) of the Act. In that regard, the record reflects that on March 8, 2006, respondent was convicted in the United States District Court, 7th District of Texas, for the offense of "false statement in an application for passport" in violation of 18 U.S.C. Section 1542. *See* Exhibit No. 3. It is the contention of the Government that respondent's conviction, together with the corresponding indictment, provides sufficient documentation to prove by clear and convincing evidence that the respondent falsely claimed United States citizenship and is, therefore, subject to removability relating to Section 212(a)(6)(C)(ii) of the Act.

The Court would note that to be subject to that ground of inadmissibility, the respondent need not be convicted of an offense. Therefore, not only will the Court consider the conviction, the Court will also

consider the evidence that has been presented in this case.

The respondent was convicted under count 1 of the indictment. That indictment reads in part:

> Olga Barcenas-Barrera, defendant herein, willfully and knowingly made a false statement in an application for a passport with intent to induce and secure for her own use the issuance of a passport under the authority of the United States . . . , in that in such application the defendant stated that her place of birth was 'Edinburg, Texas' which statement she knew to be false.

The Court notes, quite importantly, that the respondent was not convicted under 18 U.S.C. Section 911. That section defines an offense of "making a false claim to United States citizenship." Instead, respondent was convicted of fraudulently listing a place of birth within the United States on a passport application. Therefore, in order for a charge of removability to be sustained, the Government must prove by clear and convincing evidence that a false claim to birth in the United States on a passport application is equivalent to a false claim of United States citizenship.

This Court finds that falsely claiming birth in the United States on a passport application is not synonymous with falsely claiming United States citizenship. One can apply for a United States passport, whether or not the person is eligible for such a passport. For example, anybody can apply for a passport,

as long as the information contained in the passport supports the granting of the passport, and is all true and correct, and the passport agency can grant and issue the passport. If the information does not support the issuance of the passport, albeit all true and accurate, the passport agency can deny the application and not issue the passport. It is not illegal, as far as the Court believes, for anyone to file for a United States passport. The passport application may be granted and it may be denied. The respondent's action, however, caused not just the Government to deny the passport, but to deny because she put false information on that passport. Further, one can apply for a United States passport either as a citizen or as a noncitizen national of the United States. See 22 C.F.R. Section 51.2(a), which states that a United States passport shall be issued only to a national of the United States. 22 C.F.R. Section 51.1(d) defines a national to mean "a citizen of the United States or a noncitizen owing common allegiance to the United States." It is clear then, the Government can grant a passport application to either a citizen or a class of noncitizens. Therefore, for the Government to conclude that by just applying for a passport and claiming to be born in the United States, someone, necessarily, is claiming to be a citizen is inaccurate.

The Government's position was based on its reading of Section 301 of the Immigration and Nationality Act. Section 301 of the Immigration and Nationality Act lists persons who are citizens of the United States. Section 301(a) indicates that a person

born in the United States, and subject to the jurisdiction thereof, shall be a national and citizen of the United States at birth. Not only does that section require that a person who was born is [sic] the United States to be a national and citizen of the United States, but further requires that the person be subject to the jurisdiction of the United States. Someone who was born in the United States is not necessarily subject to the jurisdiction of the United States. The evidence presented indicates that respondent could be claiming to be a United States citizen, but does not necessarily indicate that she was claiming herself to be a United States citizen. Section 212 of Title 22 of the United States Code indicates that no passport shall be granted or issued to or verified for any other persons than those owing allegiance, *whether citizens or not,* to the United States. This, again, reflects that passports are not merely issued to citizens of the United States. Interestingly, this section was amended by the Act of June 14, 1902 substituting the phrase citizens of the United States with those owing allegiance, whether citizens or not, to the United States.

Furthermore, case law indicates that a passport issued to a person by the Secretary of State is not evidence of citizenship of such person in the United States. *See Edsell v. D. Charlie Mark,* 179 F. 292 (9th Cir. 1910).

Further evidence that passports are not only issued to United States citizens is the fact the passport application itself never asks if the person is a citizen of the United States. As indicated earlier, the

claim of birth in the United States is not equivalent to claiming citizenship since someone can legitimately claim U.S. citizenship without having been born in the United States, while others born within the United States cannot boast citizenship in this country. *See Smiley v. United States,* 181 F.2d 505 (9th Cir. 1950).

Based upon the foregoing, the Court cannot find that respondent's conviction supports a conclusion that she made a false claim of United States citizenship.

The Court then considered the evidence presented by the Government relating to this charge of falsely claiming United States citizenship. In that regard, the Government submitted respondent's evidence of registration of lawful common residence, the Government's record of deportable/inadmissible alien, and the computer printout of the underlying offense of Section 1542. The Government also submitted the conviction record relating to the respondent's conviction of falsely providing information. The Government also submitted respondent's application for adjustment of status, and most recently, a copy of respondent's passport application, the passport office's investigative reports. Nowhere in any of these documents reflect that the respondent had possibly made a claim that she is a United States citizen. The investigative reports relate to the false information provided on the application. As identified by respondent's counsel, the record does not even contain a copy of this alleged false birth certificate. There is no evidence that the respondent presented the birth

certificate to anyone. The only information that may allude to the presentation of the birth certificate was a reference the [sic] group Exhibit 11 tab F page 3, which relates to "a tested record of birth certificate". That document, apparently, was supposedly attached to this record, nevertheless, it was never presented to the Court with the report. Therefore, the Court cannot conclude whether or not that statement is a fact that the Court can consider.

The Court recognizes that a birth certificate may be used in a claim for citizenship. However, the Court cannot find that a birth certificate is necessarily evidence of "falsely *claiming*" of United States citizenship. The Court cannot find that the record reflects clear and convincing evidence that respondent has ever claimed that she is a United States citizen. In fact, she testified, credibly, that she never claimed to be a United States citizen.

Furthermore, as indicate earlier, that just because she put down on her application that she was born in the United States does not necessarily that she was claiming to be a United States citizen. Even if she had presented the birth certificate to the passport office, the Court still cannot conclude that, for the purpose of obtaining a passport, she presented that document to claim that she is a United States citizen. In fact, respondent testified that she does not read or write other than her name, and she may recognize date of birth, and she can read the alphabet. The application was filled out by her neighbor and

she did not realize, allegedly, that by putting the information on her application, she was claiming that she was born in the United States or that she was a United States citizen. Under the circumstance, the Court finds that the Government has failed to establish by evidence that is "clear and convincing" that the respondent falsely claimed to be a United States citizen. Accordingly, the charge relating to Section 212(a)(6)(C)(ii) of the Act is not sustained.

As indicate earlier, respondent has established eligibility for a waiver under Section 237(a)(1)(H) of the Act. Respondent's fraud, or willful misrepresentation, the material fact seeking admission into the United States, has now been waived retroactively. See *Matter of Tejon* (phonetic sp.), 22 I&N Dec. 408 (BIA 1998); *Matter of Sosa-Hernandez*, 20 I&N Dec. 758 (BIA 1993).

Based upon the foregoing, the following orders shall therefore be entered:

## ORDERS

IT IS HEREBY ORDERED that the respondent's application for a waiver pursuant to Section 237(a)(1)(H) of the Immigration and Nationality Act, as it relates to respondent's application for adjustment of

status granted by the Government on September 23, 2004, be granted.

PHILIP S. LAW
Immigration Judge